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No. 98-197

In the Supreme Court of the United States

OCTOBER TERM, 1997

BRIAN E. ROUTEN, PETITIONER

v.

TOGO WEST,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether the court of appeals had jurisdiction to determine that a heightened burden imposed upon the government to rebut an evidentiary presumption is not a substantive change in the law that serves as a basis to reopen an otherwise final decision denying a veteran's disability benefits claim.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (Pet. App. 1-22) is reported at 142 F.3d 1434. The opinion of the United States Court of Veterans Appeals (Pet. App. 23-42) is reported at 10 Vet. App. 183. The opinion of the Board of Veterans' Appeals (Pet. App. 43-51) is unreported.

JURISDICTION

The judgement of the court of appeals was entered on April 30, 1998. The petition for a writ of certiorari was filed on July 29, 1998. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A veteran who has served in the armed forces during peacetime is entitled to compensation for a disability "resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty." 38 U.S.C. 1131. A preexisting disease "will be considered to have been aggravated by active military * * * service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease." 38 U.S.C. 1153. For wartime service veterans, the government may rebut the presumption that an aggravation in disease is service-connected by showing "clear and unmistakable evidence" that the increase in disability was due to the natural progression of the disease. 38 C.F.R. 3.306(b). In 1992, the Veterans' Administration (VA) amended 38 C.F.R. 3.306(b) to extend the heightened "clear and unmistakable evidence" rebuttal standard to veterans with peacetime service after December 31, 1946. 57 Fed. Reg. 59,296 (1992).

A final decision by the Secretary denying a claim for benefits may be appealed to the Board of Veterans' Appeals (Board). 38 U.S.C. 7104(a). Except as provided by 38 U.S.C. 5108, "when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered." 38 U.S.C. 7104(b). Section 5108 requires the Secretary to reopen a claim

for benefits "[i]f new and material evidence is presented or secured." 38 U.S.C. 5108.*

The Court of Veterans Appeals (CVA) has the exclusive jurisdiction to review decisions of the Board. 38 U.S.C. 7252(a). Decisions of the CVA in turn are subject to review by the Federal Circuit. 38 U.S.C. 7252(c), 7292. The Federal Circuit may review "the validity of any statute or regulation * * * or any interpretation thereof * * * that was relied on" by the CVA in making its decision, and the Federal Circuit has the exclusive jurisdiction "to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof." 38 U.S.C. 7292(a) and (c). Further, the Federal Circuit "shall decide all relevant questions of law," but the court of appeals may not review "a challenge to a factual determination, or * * * a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. 7292(d)(1) and (2).

2. In April 1997, petitioner attempted to enlist in the United States Navy, but was deemed medically ineligible for military service due to a disqualifying medical diagnosis of psoriasis on his legs discovered during a physical examination. Three months later, following the submission of a letter from petitioner's private physician stating that his condition was successfully treated and was just an "eczematous patch . . . with secondary infection," the Navy changed the diagnosis in petitioner's entrance medical examination to episodic eczema. Pet. App. 2.

On December 19, 1977, petitioner began serving in the Navy. On January 3, 1978, approximately two

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* The Board's decision also may be revised if the decision was based on "clear and unmistakable error." Pub. L. No. 105-111, § 1(b)(2), 111 Stat. 2271 (to be codified at 38 U.S.C. 7111(a)).

weeks after beginning active duty, petitioner began complaining about, and seeking weekly medical treatment for, his skin condition. On April 27, 1978, Navy doctors diagnosed petitioner's skin condition as psoriasis. On September 26, 1978, the Naval Medical Board found that petitioner was unfit for further Navy service because of his psoriasis. The Medical Board also concluded that petitioner's Naval service neither caused nor aggravated his condition. The Medical Board found that petitioner developed his medical condition approximately two years prior to his enlistment in the Navy. On October 2, 1978, petitioner was medically discharged from the Navy. Pet. App. 2-3; Gov't C.A. Br. 3-4.

In January 1979, petitioner filed a claim for disability benefits with the Veterans Administration, alleging that his psoriasis was service connected. On January 30, 1979, the VA's Regional Office denied petitioner's claim based upon its finding that petitioner's psoriasis was "neither incurred in nor aggravated by his short period of active duty [service]." Pet. App. 3. Petitioner did not appeal from that determination. *Ibid.*

Later in 1979, petitioner filed with the VA a second claim for disability benefits for his skin condition. On July 10, 1979, the Regional Office treated petitioner's application as a request for reconsideration and denied his request. Almost nine years later, in May 1988, petitioner submitted another application for disability compensation based upon his psoriasis. The Regional Office again denied petitioner's request. The record does not indicate that petitioner appealed either of those decisions. Pet. App. 4.

In September 1992, petitioner requested that his disability compensation claim be reopened on the basis of new and material evidence under 38 U.S.C. 5108. In

support of his request, petitioner attached his post-military service medical records showing continuous medical treatment for his psoriasis. In December 1992, the Regional Office denied petitioner's request. Pet. App. 4.

3. The Board affirmed the VA's denial of petitioner's reopening request. Pet. App. 43-51. The Board concluded that petitioner's evidence was not new and material, because it did "not show that there was an increase in the severity of psoriasis * * * during service." *Id.* at 45. Because the Board found that petitioner failed to establish that his condition actually worsened during his active duty service, the Board did not reach the merits of petitioner's contention that he was entitled to the presumption that an increase in disability is attributable to military service under 38 C.F.R. 3.306(b) as amended in 1992. Pet. App. 50.

4. The CVA affirmed the Board's decision. Pet. App. 23-30. The CVA likewise found that petitioner's post-military service medical records did not constitute "new and material evidence" under 38 U.S.C. 5108. Pet. App. 26-28. The CVA also rejected the request of the Secretary that the matter be remanded to allow the Board to determine whether the 1992 change in the presumption of aggravation affects petitioner's claim for benefits under the CVA's decision in *Spencer* v. *Brown*, 4 Vet. App. 283 (1993), aff'd 17 F.3d 368 (Fed. Cir. 1994). Pet. App. 28-29. In *Spencer*, the CVA concluded that "[w]hen a provision of law or regulation creates a new basis of entitlement to benefits, as through liberalization of the requirements for entitlement to a benefit, an applicant's claim of entitlement under such law or regulation is a claim separate and distinct from a claim previously and finally denied prior to the liberalizing law or regulation." 4 Vet. App. at

288; see also 17 F.3d at 372. In rejecting the application of *Spencer* to the present case, the CVA reasoned that "the presumption of aggravation created by 38 C.F.R. § 3.306 applies only if there is an increase in severity during service." Pet. App. 29. The CVA further explained that the record supported the Board's factual finding that petitioner's medical records do not demonstrate an increase in the severity of petitioner's psoriasis during service. *Ibid.* The CVA thus concluded that 38 C.F.R. 3.306(b) "is not applicable to [petitioner's] claim." Pet. App. 29.

5. A divided panel of the Federal Circuit affirmed. Pet. App. 1-22. The court of appeals first observed that it lacked jurisdiction under 38 U.S.C. 7292(d)(2) to consider whether petitioner's "newly submitted medical records qualify as 'new and material' evidence sufficient to reopen a claim pursuant to 38 U.S.C. § 5108," because that question is either "a factual determination or * * * an application of the law to the facts of a particular case." Pet. App. 5. The court explained, however, that it has "jurisdiction to review the decision of the [CVA] with regard to its interpretation of the governing statutes and the 1992 change in the regulations regarding the presumption of aggravation made pursuant to those statutes." *Ibid.*

The court of appeals also observed that, unless petitioner could establish a basis for reopening his claim for disability benefits, his failure to appeal the VA's January 1979 decision denying him benefits rendered that decision final under 38 U.S.C. 7104(b). Pet. App. 6-7, 15. The court of appeals then rejected petitioner's contention that the amended burden-shifting presumption applicable to peacetime service veterans under 38 C.F.R. 3.306(b) constitutes new and material evidence for purposes of reopening a claim under 38 U.S.C. 5108.

Pet. App. 8-14. The court of appeals reasoned that "[o]nce new and material factual *evidence* is presented that warrants reopening of the case, the presumption may well result in a decision in favor of the veteran. But that is a matter that goes to the merits of the case, not one that goes to the question of whether the rules of finality are overcome." *Id.* at 13-14.

The court of appeals further rejected petitioner's argument that the amended evidentiary presumption under 38 C.F.R. 3.306(b) was a "liberalizing" change in the law that served as a basis for reconsidering petitioner's benefit claim under the court of appeals' decision in *Spencer*. Pet. App. 14-19. The court reasoned that the changed regulation "is procedural in nature" and "does not effect a substantive change in the law; that is, it does not create a new cause of action, since no new basis of entitlement is created." *Id.* at 17; see also *ibid.* ("The peacetime service veterans simply benefit from a stronger presumption toward the same ultimate disability benefit entitlement, based on the same factual predicates."). The court of appeals further explained that if "the intervening change rule * * * is to escape the bar of [38 U.S.C.] 7104(b), [it] must be that the intervening change in law creates a new cause of action. Otherwise, every time * * * the agency changes a regulation to make it easier to prove entitlement, any claimant who previously was denied a benefit could reopen the claim," notwithstanding the principle of finality under 38 U.S.C. 7104(b). Pet. App. 18. The court of appeals therefore concluded that "the [CVA] correctly determined that there has been no substantive change in the law creating a new cause of action." *Id.* at 19.

Judge Bryson concurred in part and dissented in part. Pet. App. 19-22. He concurred with the majority

"that the 1992 change in the application of the presumption of aggravation to peacetime veterans does not constitute 'new and material evidence' within the meaning of 38 U.S.C. § 5108." *Id.* at 20. In his view, however, the court of appeals should have remanded the "'liberalizing change' issue" to the CVA to address in the first instance. *Ibid.*

ARGUMENT

1. Petitioner argues (Pet. 16-20) that the Federal Circuit lacked jurisdiction to interpret 38 U.S.C. 7104(b) or to consider whether the amendment to 38 C.F.R. 3.306(b) constituted a "liberalizing change" within the meaning of *Spencer*, because the CVA addressed neither of those issues. That argument is without merit.

Section 7292 of Title 38 U.S.C. expressly authorizes the Federal Circuit to "decide all relevant questions of law," 38 U.S.C. 7292(d)(1), and to decide any challenge to an interpretation of a regulation, 38 U.S.C. 7292(c), whether or not the legal issue was decided by the CVA. Here, petitioner squarely raised on appeal the two legal issues to which he now raises a jurisdictional challenge, *i.e.*, whether an amendment to a regulatory burden-shifting presumption is new and material evidence under 38 U.S.C. 5108, or whether it constitutes a "liberalization of the requirements for entitlement to a benefit" within the scope of the court of appeals' decision in *Spencer*. Pet. App. 8-19; see also Pet. C.A. Rep. Br. 1 ("That these issues call for review of [CVA's] interpretation of a statute and a regulation cannot be rationally disputed."); accord Pet. C.A. Br. 14, 28. No one questioned the court's jurisdiction to decide those questions; even the dissent did not argue that the majority lacked jurisdiction to reach those legal issues,

but rather expressed the view that the court of appeals' resolution of the proper scope of *Spencer* would "benefit" from the "analysis of the [CVA] and full briefing from the parties." *Id.* at 22. Accordingly, further review by this Court is not warranted.

2. Petitioner also argues (Pet. 19-20) that the court of appeals' application of the *Spencer* rule in this case is inconsistent with the policy of interpreting statutes in favor of veterans. That contention also does not warrant this Court's review.

The court of appeals correctly determined that a "change in the evidentiary standard required to rebut the presumption [of aggravation] is procedural" and does not create a new substantive cause of action for benefits within the meaning of *Spencer*. Pet. App. 17. As the court of appeals explained, "there is no specific statutory provision" allowing an intervening change in the law to be a basis for reopening, and a broad reading of its decision in *Spencer* would circumvent the principle of finality embodied in 38 U.S.C. 7104(b). Pet. App. 18.

In any event, this case would not be a suitable vehicle for this Court's review of the question whether the amendment to 38 C.F.R. 3.306(b) constitutes a "liberalizing change" under *Spencer* entitling a claimant to a reconsideration of his claim for benefits. The presumption that a pre-existing disease "will be considered to have been aggravated by active military * * * service" applies only "where there is an increase in disability during such service." 38 U.S.C. 1153. Similarly, the quantum of proof necessary to rebut that presumption is only relevant "where the preservice disability underwent an increase in severity during service." 38 C.F.R. 3.306(b). The Board and the CVA found in this case, however, that petitioner failed to

demonstrate that the severity of petitioner's psoriasis actually increased during his short term of service. Pet. App. 29, 45, 49-50. That factual finding is not subject to further review by the court of appeals. See 38 U.S.C. 7292(d)(2); Pet. App. 5. Absent evidence of an aggravation of petitioner's disability during service, the applicability of the change in 38 C.F.R. 3.306(b) simply has no relevance to petitioner's request to reopen his claim for benefits. Accordingly, resolution of the question whether the Federal Circuit correctly applied the rule it announced in *Spencer* would not affect the outcome in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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